

DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

JAN 19 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

)

)

1998 Biennial Regulatory Review -

)

MM Docket No. 98-93

Streamlining of Radio Technical Rules in

)

Parts 73 and 74 of the Commission's Rules

)

PETITION FOR PARTIAL RECONSIDERATION

1. Southern Nevada Educational Broadcasters ("Southern Nevada"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby petitions the Commission to reconsider one aspect of the rules promulgated in the above-referenced proceeding. As detailed below, the new - and retroactive - rule requiring certain applicants for noncommercial educational FM ("NCE-FM") stations to amend their pending applications to provide a predicted 60 dBu signal to at least 50 percent of their communities of license or reach 50 percent of the population within such communities is plainly unfair to applicants, like Southern Nevada, who filed their applications long before the Commission announced any intention to change the rules to require such coverage, and who now are unable to comply with the new rule due to short-spacing problems or risks of losing cut-off protection.

I. BACKGROUND

2. Southern Nevada. In October 1997, Southern Nevada filed an FCC Form 340 application for a new NCE-FM station on Channel 216 licensed to Las Vegas, Nevada. FCC File No. BPED-19971010MC. Southern Nevada's application was filed in response to an A cut-off

No. of Copies rec'd
A B C D E

0+11

list after Living Proof, Inc. filed an application for a new NCE-FM station on Channel 217 at Barstow, California.¹ FCC File No. BPED-19970609MG.

3. When it filed its application, Southern Nevada requested that its community of license be Las Vegas, as opposed to Mountain Pass, California – a community over which the station would provide 60 dBu coverage – because it will out of necessity have to rely primarily on the much larger Las Vegas for volunteers and fund raising. Southern Nevada also knew that its proposed tower site was on a mountain overlooking Las Vegas, so the station likely will provide a listenable signal to the Las Vegas area. Southern Nevada also is aware that many people who enjoy niche programming often go to extra efforts to receive weaker signals.

4. From personal experience, the principals of Southern Nevada knew when they filed the application in October, 1997 that NCE-FM stations were not required to provide any 60 dBu coverage to their respective communities of license. In fact, the Commission routinely granted NCE-FM applications where the proposed station would provide no predicted coverage to its community of license. *See, e.g.*, File Nos. BLED-19880323KB and BLED-19830110AG.

5. The Commission's Previous Policy Did Not Require a Minimum Signal Strength. The fact that NCE-FM applicants were not required to specify a minimum signal strength over a proposed station's community of license had been well established. *See, e.g., Amendments of Parts 73 and 74 of the Commission's Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit, Report and Order*, MM Docket No. 96-58, FCC 97-

¹ Living Proof has since filed a request to make a minor amendment to its application, which would resolve the mutual exclusivity between its application and Southern Nevada's application. Thus, the only obstacle to Southern Nevada receiving a grant of its application is the imposition of the retroactive rule requiring 60 dBu coverage to its proposed community of license.

290, 12 FCC Rcd 12371, 12380, note 11 (1997); *see, also, Streamlining of Radio Technical Rules, Notice of Proposed Rule Making and Order*, MM Docket No. 98-93, 13 FCC Rcd 14849, ¶ 57 (1998) (the "NPRM") (noting that "[t]he Commission's rules *do not require* NCE FM stations operating in the reserved band...to place a minimum field strength over their communities of license....") (emphasis added).

6. Among the Commission's reasons for this policy was that many NCE-FM stations do not operate with sufficient power to place a city grade signal over the entire community of license. *Id.* The Commission noted the fact that many NCE-FM stations may not have the financial resources to construct stations powerful enough to provide community-of-license coverage. *Id.* The Commission also found support for its policy because NCE-FM stations often target niche audiences in limited geographical areas, so providing a city grade signal over areas outside the niche area is unnecessary and could prove economically inefficient. *Id.*

7. With this policy in mind, noncommercial educational broadcasters routinely filed Form 340 applications for new NCE-FM stations, knowing that they were not required to provide a minimum signal strength to the station's community of license. Moreover, the Commission routinely granted these applications – at least until October, 1997.

8. The Commission's Surprise New Policy Required a Minimum Signal Strength. On October 19, 1997, the Audio Services Division returned an application filed by principals of Southern Nevada to modify the construction permit for a new NCE-FM station at Naples, Florida because the station's community of license was approximately 20 kilometers beyond the station's proposed 60 dBu service contour. *See* Letter from Dennis Williams, Assistant Chief, Audio Services Division, Mass Media Bureau, Federal Communications Commission, to Ann Bavender,

Esquire, Fletcher, Heald & Hildreth, October 19, 1997 (the "Williams Letter"); *see, also*, File Nos. BMPED-19970910MD, the application to modify BPED-19940531MA. Although the Williams Letter acknowledged that the Commission traditionally had not required a noncommercial educational station to specify a minimum signal strength over the station's community of license and that allowing construction of such station "does not violate any rule section", the modification application was nevertheless returned. *Id.*

9. Rather than sticking with well-established precedent that an NCE-FM station was not required to provide a minimum signal strength over the station's community of license, the Williams Letter announced a new policy: Absent a waiver, the Commission no longer would grant an application for a new NCE-FM or an NCE-FM modification application if the proposed 60 dBu contour of the station would not cover some portion of the station's community of license. *Id.* The Williams Letter based this new policy on the "implicit" recognition that Section 307(b) of the Communications Act of 1934, as amended, requires the "Commission to protect service to the community of license from interference from other stations...", and that such protection could not be assured if the station did not provide an interference-free signal over the community.² *Id.*

10. Notably, the Williams Letter failed to mention that the Commission granted the original construction permit application for the Naples station, File No. BPED-19940531MA, even though the station's authorized 60 dBu contour did not encompass any part of Naples, and

² The only case cited in support of this new policy concerned a commercial FM station – a class of station that clearly is required under the rules to provide a minimum signal strength coverage over its community of license. Williams Letter, page 2 (citing Letter to KDAY(FM), Independence, California, from Larry D. Eads, Chief, Audio Services Division, 9 FCC Rcd 2753 (1994)). *See, also* 47 C.F.R. § 73.315 (requiring commercial FM stations to provide a minimum field strength of 3.16 mV/m over the entire community of license).

no waiver was requested. Furthermore, the Commission eventually granted the modification application despite the fact that the station, as modified, would provide no community-of-license coverage. *See* File No. BMPED-19970910MD (granted June 9, 2000).

11. The NPRM. The validity of the new policy announced in the Williams Letter was questionable because it changed a long-standing rule without notice and comment. The legitimacy of the Williams Letter became even more in dispute when the full Commission released the *NPRM* seeking comments on, *inter alia*, whether an NCE-FM station should be required to provide any coverage to its community of license. *See NPRM*, ¶¶ 57-58. Importantly, the Commission proposed to apply the new policy – *if adopted* – "only to new station and modification applications filed after the effective date of this new rule." *Id.* ¶ 58. Thus, Southern Nevada and other NCE-FM applicants rightfully believed that even if the new policy was properly and legally adopted pursuant to the rule making proceeding, it would not apply to applications filed before any new rule went into effect.³

II. DISCUSSION

12. Retroactive Application of a New Rule Is Unfair. Simply put, it is patently unfair for the Commission to "change the rules in the middle of the game." When Southern Nevada filed its application for a new NCE-FM station at Las Vegas, it rightfully relied on the Commission's well-known policy that NCE-FM station applications would be routinely granted even if the

³ Southern Nevada tried to resolve the potential conflict between the Williams Letter and its Las Vegas application when it requested in February, 1998 to amend its application *nunc pro tunc* to change its community of license from Las Vegas to Mountain Pass, California, a community over which its proposed NCE-FM station would provide 60 dBu coverage. The amendment was contingent on the outcome of the *NPRM* with respect to pending applications. To our knowledge, that request remains pending.

station's proposed 60 dBu contour fell short of the station's community of license. Given the facts that Southern Nevada filed its Las Vegas application before the Williams Letter announced its questionable new policy regarding NCE-FM coverage and more than eight months before the Commission released the *NPRM* in which it asked whether it should promulgate the new coverage rule and apply it only to *new* NCE-FM applications, the Commission should reconsider applying the rule to applications filed before the new rule went into effect. Southern Nevada's position is strengthened by the fact that its application is subject to cut-off protection, and is protected from competing applications.

13. If the community-of-license-coverage rule is applied retroactively, Southern Nevada and other NCE-FM applicants whose stations, if constructed, would provide no or insufficient coverage will be trapped in a quagmire. Most applicants cannot amend their applications to provide a predicted 60 dBu signal to at least 50 percent of the respective community of license or reach 50 percent of the community's population because of predicted interference to existing or proposed stations. That is the case with Southern Nevada's Las Vegas application. If an applicant cannot amend to change its proposed coverage contour, it is limited to filing a request to change its community of license to a community to which it could provide the required coverage, or filing a curative amendment in which it requests that the Commission waive its processing rules to allow the change-in-community amendment.

14. Of course, a change in community of license is a major change, which may even require filing a request for rule making if no accommodating allotment has been made to the new community. Furthermore, an NCE-FM applicant may not file a major modification application requesting a change in community unless the Commission opens a filing window. *See*

Reexamination of the Comparative Standards for Noncommercial Educational Applicants, MM Docket No. 95-31, 15 FCC Rcd 7386 (2000). Although all NCE-FM applicants which do not comply with the new rule are required to file curative amendments by February 20, 2001, the Commission has not indicated that it even intends to open a window for them to file major modification applications in order to comply with the new rule.

15. If the Commission opens a filing window to allow major amendments by the February 20, 2001 deadline, and an NCE-FM applicant files a request to change its community of license, the applicant will be subject to competing applications, and its efforts to provide service will be delayed, at a minimum, or for naught if another applicant ultimately receives the construction permit. That result hardly seems equitable for an applicant, such as Southern Nevada, that had its application on file long before the Commission even considered adopting its new NCE-FM coverage rule.

III. THE SOLUTION

16. Despite the bleak outlook for NCE-FM applicants, such as Southern Nevada, the Commission has other options to avoid this injustice.

17. The Commission could, as it proposed in the *NPRM*, apply the new rule only to new and modification applications filed after the effective date of the new rule. *See NPRM*, ¶ 57. That solution certainly would be the most equitable since the new rule would not be applied retroactively to noncommercial applicants who relied upon the old policy. Southern Nevada respectfully urges the Commission to adopt this most appropriate resolution.

18. Or, the Commission could waive its processing rules to allow NCE-FM applicants, such as Southern Nevada, to amend their applications *nunc pro tunc* to change their communities of license without being subject to new cut-off dates or competing applications.

IV. CONCLUSION

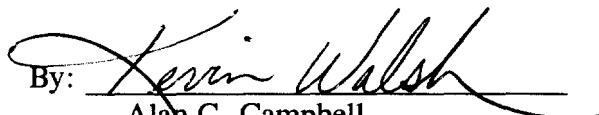
19. As demonstrated above, Southern Nevada and many other NCE-FM applicants relied on the Commission's long-standing policy that noncommercial stations did not have to provide 60 dBu coverage to their communities of license. And those who filed applications long before the Commission contemplated requiring them to provide a predicted 60 dBu signal to at least 50 percent of the community of license or reach 50 percent of the population within such community are caught in a catch-22: They cannot file curative amendments to provide the required coverage because of short-spacing problems or risks of losing cut-off protection. And they cannot file applications to change their respective communities of license because such applications would be major modifications subject to competing applications, which requires the Commission to first open a filing window. Moreover, some applicants needing to change their communities of license would first have to ask the Commission to initiate a rule making proceeding to obtain the necessary allotment.

20. As a simple matter of fairness, Southern Nevada respectfully requests that the Commission reconsider its newly promulgated rule and either apply the rule only to applications filed after the rule's effective date, or allow these applicants to amend their applications *nunc pro*

tunc to change their communities of license without being subject to new cut-off dates or competing applications.

Respectfully requested,

SOUTHERN NEVADA
EDUCATIONAL BROADCASTERS

By: 
Alan C. Campbell
Kevin M. Walsh
Its Attorneys

IRWIN, CAMPBELL & TANNENWALD, P.C.
1730 Rhode Island Avenue, NW
Suite 200
Washington, DC 20036
(202) 728-0400

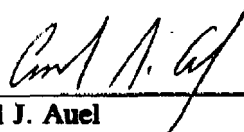
January 19, 2001

kmw/36456p.007

DECLARATION OF CARL J. AUER

I, Carl J. Auer, hereby declare, under the penalty of perjury, the following:

1. I am a Trustee of Southern Nevada Educational Broadcasters.
2. I have read the foregoing "Petition for Partial Reconsideration" and the facts stated therein are true and correct to the best of my information, knowledge, and belief.



Carl J. Auer

Trustee

Southern Nevada Educational Broadcasters

January 19, 2001